UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

MIRKO RALLI-FALCONI,

Defendant.

5:19-CR-0088
(GTS)

APPEARANCES:

HON. GRANT C. JAQUITH
United States Attorney for the N.D.N.Y.
Counsel for the Government
P.O. Box 7198
100 South Clinton Street
Syracuse, NY 13261-7198

OF COUNSEL:

MICHAEL D. GADARIAN, ESQ.
Assistant United States Attorney

HON. LISA PEEBLES
Federal Public Defender for the N.D.N.Y.
Counsel for Defendant
4 Clinton Square, 3rd Floor
Syracuse, NY 13202

GABRIELLE DiBELLA, ESQ.
Assistant Federal Public Defender

GLENN T. SUDDABY, Chief United States District Judge

DECISION and ORDER

Currently before the Court, in this criminal prosecution of Mirko Ralli-Falconi ("Defendant") for one count of illegal reentry into the United States after deportation or removal in violation of 8 U.S.C. § 1326(a), is Defendant's motion (a) to suppress evidence related to, and found as a result of, his apprehension by United State Border Patrol agents on February 26, 2019, and (b) for an evidentiary hearing. (Dkt. No. 9.) For the reasons set forth below, Defendant's motion is denied in both respects.

I. THE PARTIES' ARGUMENTS ON DEFENDANT'S MOTION

A. Defendant's Memorandum of Law

Generally, in his motion to suppress, Defendant makes two arguments. (Dkt. No. 9 [Def.'s Mem. of Law].) First, Defendant argues that the Court should suppress any and all evidence obtained during, and as a result from, his encounter with two Border Patrol Agents (Roger Audet and Jerrad Bell) at the Syracuse Regional Transportation Center ("SRTC") on February 26, 2019, because the agents' actions in stopping and questioning him violated the Fourth Amendment. (*Id.*) More specifically, Defendant argues as follows: (a) the Border Patrol's authority to conduct roving stops within 100 miles of the border (which is where the stop was conducted here) does not override the protections afforded to Defendant by the Fourth Amendment, which prohibits stops based solely on an individual's race or appearance, or based on race or appearance combined with his or her travel; (b) Defendant was seized without reasonable suspicion within the meaning of the Fourth Amendment because (i) he reasonably did not feel free to leave the bus line during the agents' questioning based on the fact that he risked missing his bus if he walked away from the line, the agents were in uniform, the agents had visible weapons within reach, and the agents questioned Defendant for several minutes in English (a language of which he states he has a limited understanding), and (ii) the Government has not offered any indication that Defendant was engaged in suspicious behavior before the seizure; and (c) because Defendant's seizure was in violation of the Fourth Amendment, all verbal and physical evidence obtained from him at the SRTC, and after he was taken from the SRTC to the Oswego Border Patrol Station, must be suppressed pursuant the "fruits of a poisonous tree" doctrine. (*Id.*)

Second, Defendant argues that statements made during the custodial interrogation at the SRTC (and subsequently at Oswego Border Patrol Station) must also be suppressed because they were also obtained in violation of the Fifth Amendment. (*Id.*) More specifically, Defendant argues that "[h]ere, [he] could not speak English when he was questioned, and [that,] despite his difficulty with the language, the officers continued to question him while he was attempting to board a bus that was set to depart in five minutes," without advising him of his *Miranda* rights. (*Id.*)

B. The Government's Opposition Memorandum of Law

Generally, in its opposition memorandum of law, the Government makes three arguments. (Dkt. No. 10 [Govt.'s Opp'n Mem. of Law].) First, the Government argues that Defendant's motion to suppress the statements he made at the Oswego Border Patrol Station should be denied as moot because the Government does not intend to use that evidence in its case-in-chief at trial. (*Id.*)

Second, the Government argues that the remainder of Defendant's motion should be denied because his encounter with Border Patrol agents at the SRTC was consensual and not part of a detention or seizure. (*Id.*) More specifically, the Government argues that (a) Defendant's affidavit does not provide specific facts as to how the agents questioned him or how their behavior otherwise suggested that he was not free to leave or ignore their questions, and (b) there is no evidence that he encountered more than two agents, that the agents brandished their firearms, that the agents made any physical contact with him or anyone else (or positioned themselves in a way that prevented him from leaving), that the agents used language or a tone of voice suggesting that he was not free to leave, or that the encounter occurred somewhere other

than a large public space where free movement was permitted. (*Id.*) The Government also argues that, as a result, this encounter was a consensual one, during which the agents could generally ask questions of individuals without any level of particularized suspicion, as long as they did not convey that answering their questions was required. (*Id*.)

Third, the Government argues that the Court need not hold an evidentiary hearing before it decides Defendant's motion, because (a) his affidavit lacks details about the actions taken and/or words spoken by the agents that caused him to believe that he was required to answer the agents' questions and was not free to leave, and (b) indeed, Defendant has not provided any evidence that there was a physical "stop" for purposes of the Fourth Amendment given that he was approached while waiting for a bus in a public area and was not prevented from leaving. (*Id*.)

C. Defendant's Reply Memorandum of Law

Generally, in his reply memorandum of law, Defendant makes two arguments. (Dkt. No. 11 [Def.'s Reply Mem. of Law].) First, in reply to the Government's third argument, Defendant argues that an evidentiary hearing is required to resolve disputed facts raised by the evidence. (*Id*.) More specifically, Defendant argues that the declarations submitted by Agents Jerrad Bell and Roger Audet provide details that are either missing from or inconsistent with the narrative report authored by Border Patrol Agent Paul Vandish, Jr.: (a) whether Agents Audet and Bell approached the line from different ends or whether they approached Defendant together, and (b) whether Defendant volunteered that he was not a United States citizen even before Agent Bell approached him. (*Id.* at 2.) Moreover, Defendant argues that a hearing is necessary to determine (c) whether or not Defendant was in fact seized, and (d) which statements are attributable to

Defendant and which are attributable to his wife (whom the Border Patrol agents were, at some point in the time, using as an interpreter). (*Id*.)

Second, in reply to the Government's second argument, Defendant argues that his encounter with Border Patrol agents was not consensual for two reasons: (a) the agents' actions were coercive in that they approached Defendant as he was waiting to board a bus (as opposed to as he was exiting a bus), knowing that he would not feel free to walk away for fear of missing the bus; and (b) the agents' actions restricted his freedom of movement in that the agents simultaneous approached him from the front and back of the line. (*Id*.)

II. RELEVANT LEGAL STANDARD

Because the parties have, in their respective submissions with regard to Defendant's motion, demonstrated an adequate understanding of the legal standard governing Defendant's motion, the Court will not summarize those legal standards in this Decision and Order, which is intended primarily for the review of the parties. Rather, the Court will merely refer to certain points of law and cases where necessary in its analysis of Defendant's motion in Part III of this Decision and Order.

III. ANALYSIS

A. Whether an Evidentiary Hearing Is Warranted

After careful consideration, the Court answers this question in the negative for the reasons stated in the Government's opposition memorandum of law. *See, supra*, Part I.B. of this Decision and Order. To those reasons the Court adds the following analysis.

"[A]n evidentiary hearing on a motion to suppress ordinarily is required if the moving papers are sufficiently definite, specific, detailed, and nonconjectural to enable the court to

conclude that contested issues of fact going to the validity of the search are in question." *United States v. Pena*, 961 F.2d 333, 339 (2d Cir. 1992). "It is well[]settled that a hearing is not required if a defendant fails to support his factual allegations with an affidavit from a witness with personal knowledge." *United States v. Harun*, 232 F. Supp. 3d 282, 285 (E.D.N.Y. 2017) (collecting cases).

Here, Defendant's argument that a hearing is required on his motion is based primarily on asserted discrepancies of fact between the declarations submitted by Agent Bell and Agent Audet and the narrative report produced by Agent Vandish. (Dkt. No. 11, at 2-3 [Def.'s Reply Mem. of Law].) However, Defendant's reliance on Agent Vandish's narrative report cannot create a genuine issue of fact necessitating a hearing because the report does not demonstrate that Agent Vandish has personal knowledge of the encounter between Agents Bell and Audet and Defendant; in particular, there is no evidence to suggest that Agent Vandish was present during the encounter in the SRTC. (Dkt. No. 9, Attach. 4, at 4-7.) *See also Crandell v. David*, 457 F. App'x 56, 58-59 (2d Cir. 2012) (finding that the affidavit from an officer who was not present during the relevant seizure and therefore did not have personal knowledge of the seizure was insufficient to create a genuine issue of material fact); *United States v. Wilson*, 493 F. Supp. 2d 364, 381 (E.D.N.Y. 2006) (finding that, "[u]nder the law of this circuit and district," an investigator who was not present at the scene of the relevant arrest had no personal knowledge of the circumstances of that arrest and therefore his affidavit was insufficient to support a request for an evidentiary hearing). Simply stated, because Agent Vandish was not present at the SRTC during the encounter with Defendant, he lacks personal knowledge as to the circumstances of that encounter and his narrative report cannot support the need for an evidentiary hearing.

In the alternative, even if Agent Vandish's narrative report was based on personal knowledge, the discrepancies that Defendant asserts are not material to deciding his motion to suppress. As stated above in Part I.C. of this Decision and Order, Defendant identifies only two such discrepancies: (a) whether Agents Audet and Bell approached the line from different ends or whether they approached Defendant together,[1] and (b) whether Defendant volunteered that he was not a United States citizen even before Agent Bell approached him. (Dkt. No. 11, at 2-3 [Def.'s Reply Mem. of Law].) For the sake of brevity, the Court will not linger on the fact that Defendant's affidavit is conspicuously absent of a clear assertion that he did not volunteer that he was a United States citizen before Agent Bell approached him. (*See generally* Dkt. No. 9, Attach. 2, at ¶¶ 6-8, 12. 14.)[2] In any event, neither of the two above-asserted discrepancies is material to deciding Defendant's motion. As will be discussed in more detail below in Part III.B. of this Decision and Order, there is more than sufficient evidence to find that it was not

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[1] The Court notes that, although Defendant states in his affidavit that he was approached by both agents together (Dkt. No. 9, Attach. 2, at ¶¶ 6-7), defense counsel argues that the agents approached from different ends of the bus line (Dkt. No. 11, at 4-7 [Def.'s Reply Mem. of Law] ["Here, the agents intentionally restricted Mr. Ralli-Falconi's freedom of movement by closing in on him with one approaching from the front and one approaching from the back. They intentionally did this while he was waiting to board a bus and risked missing the bus if he left. With one agent approaching from the back, and one approaching from the front; the people waiting feel they have nowhere to go–the agents are closing in on them."]).

[2] More specifically, Defendant's affidavit does not include any details as to whether he voluntarily offered information as to his citizenship status while Agent Bell was speaking with the couple in front of him or only after being questioned by Agent Bell; rather, he states only that "[a]fter they spoke with the African-American couple, the agents approached me and my wife," a statement which does not address the relevant issue. (Dkt. No. 9, Attach. 2, at ¶ 7 [Def.'s Aff.].) This statement does not facially conflict with Agent Bell's statement that Defendant volunteered his citizenship status while Agent Bell was speaking with the couple in front of him, after which both agents spoke to Defendant and his wife. (Dkt. No. 10, Attach. 2, at ¶¶ 5-6 [Bell Aff.].)

reasonable for Defendant to believe that he was not free to leave, even if Defendant had been approached from both ends of the line and directly questioned about his citizenship before he stated that he was not a citizen of the United States.

Defendant's argument that a hearing is required on his motion is based also on his assertion that, "[w]hile we were being questioned, I did not feel free to leave." (Dkt. No. 9, Attach. 2, at ¶ 12.) This assertion amounts to nothing more than an "airy generalit[y] and conclusory assertion[]" that is "insufficient to create a genuine issue of fact necessitating an evidentiary hearing." *United States v. Aiello*, 814 F.2d 109, 113-14 (2d Cir. 1987); *United States v. Solano*, 300 F. App'x 83, 85 (2d Cir. 2008); *see also United States v. Brown*, 12-CR-0109A, 2013 WL 6568490, at *2 (W.D.N.Y. Dec. 13, 2013) (denying the defendant's request for a suppression hearing and holding that his allegations were insufficient where the defendant asserted that he "was interrogated by members of law enforcement several hours later" and that he "was forced to sign papers during the interrogation"). Moreover, the only circumstances Defendant mentions in his affidavit that could conceivably suggest he did not feel free to leave are that (a) the officers spoke to him in English and Defendant knows only "limited" English, and (b) the "Border Patrol Agents were in full uniform, including their guns at their sides." (Dkt. No. 9, Attach. 2, at ¶¶ 10-11.) However, in addition to being insufficient to warrant a hearing, these facts are not in dispute.

Lastly, there is no need to hold a hearing to determine which statements were made by Defendant and which were made by his wife because (1) no evidence exists that his wife mistranslated any statements made to or by Defendant, and (2) in any event, such a fact would have little if any bearing on whether Defendant was seized at the time the agents were questioning him.

For all of these reasons, Defendant's request for an evidentiary hearing is denied.

B. Whether the Specified Evidence Should Be Suppressed

After carefully considering the matter, the Court answers this question in the negative for the reasons stated in the Government's opposition memorandum of law. *See*, *supra*, Part I.B. of this Decision and Order. To those reasons, the Court adds the following analysis.

As an initial matter, the Government has represented that it does not intend to use any of Defendant's statements that are at issue in this motion in its case-in-chief at trial other than Defendant's admission at the beginning of the encounter at the SRTC that he is not a citizen of the United States and is from Peru. (Dkt. No. 10, at 2-3, 5 [Govt.'s Opp'n Mem. of Law].) Defendant does not appear to challenge the Government's argument that his motion to exclude evidence that the Government will not use is moot, and in fact does not address any aspect of his motion related to that evidence in his reply memorandum of law. (*See generally*, Dkt. No. 11 [Def.'s Reply Mem. of Law].) As a result, the Court denies Defendant's motion as moot to the extent it pertains to any of that evidence, and agrees with the Government that the admissibility of any of that evidence for specific impeachment purposes would be better addressed at a time closer to trial when the circumstances of such use would be more clearly defined.[3] The Court therefore turns to an analysis of the circumstances surrounding the remaining statements.

Defendant characterizes his encounter with the Border Patrol agents at the SRTC as a

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[3] *See United States v. Mathieu*, 16-CR–0763, 2018 WL 5869642, at *1 (S.D.N.Y. Nov. 9, 2018) (denying motion to suppress as moot as to an email address because the Government stated it did not intend to use information from that account at trial); *United States v. Butler*, 15-CR-0107, 2017 WL 4324684, at *2 (W.D.N.Y. Sept. 29, 2017) (indicating that "[b]ecause attorneys are officers of the court, a judge may rely on an attorney's representations," and that "when the government represents that it will not use certain evidence against a defendant, a motion to suppress that evidence is moot"); *United States v. Barrett*, 15-CR-0103, 2016 WL 3014667, at *9-10 (E.D.N.Y. May 23, 2016) (denying motion to suppress on certain evidence where the government had stated that it would not use that evidence at trial).

Border Patrol "roving patrol." (Dkt. No. 9, Attach. 1, at 5-6.) "Border Patrol operations along inland routes–not at the border or its functional equivalent–including permanent checkpoints, temporary checkpoints, and roving patrols are held to a higher standard," such that "full-blown searches at inland Border Patrol checkpoints and by roving patrols must be supported by consent or probable cause." *United States v. Singh*, 415 F.3d 288, 294 (2d Cir. 2005) (citing *United States v. Ortiz*, 422 U.S. 891, 896-97 [1975]; *Almeida-Sanchez v. United States*, 413 U.S. 266, 273 [1973]). "[L]esser intrusions by inland roving patrols need be supported only by reasonable suspicion," i.e., "'a particularized and objective basis for suspecting legal wrongdoing given the totality of the circumstances.'" *Singh*, 415 U.S. at 294 (quoting *United States v. Arvizu*, 534 U.S. 266, 273 [2002]).[4]

The Court is reluctant to adopt Defendant's characterization of the encounter at the SRTC as a Border Patrol "roving patrol" for two reasons. (Dkt. No. 9, Attach. 1, at 5-6.) First, in *Almeida-Sanchez v. United States*, on which Defendant relies, the Supreme Court discussed Border Patrol surveillance "along inland roadways," not surveillance conducted on foot patrol. *Almeida-Sanchez v. United States*, 413 U.S. 266, 268 (1973). The Second Circuit has explained that "a case involving an automobile stop" is different from a case not involving an automobile stop (such as the case here) because "motorists do not feel free to ignore a police officer's request to pull over, since in most states to do so would be a crime." *United States v. Madison*, 936 F.2d 90, 95 (2d Cir. 1991) (citing *Berkemer v. McCarty*, 468 U.S. 420, 436 [1984]).

Second, even before an analysis of reasonable suspicion or probable cause may be

[4] If such reasonable suspicion exists, "the officer may, consistent with the Fourth Amendment, briefly detain and question the vehicle's occupants regarding their citizenship, immigration status, and any suspicious circumstances." *Singh*, 415 U.S. at 294 (citing *United States v. Brignoni-Ponce*, 422 U.S. 873, 881-82 [1975]).

conducted, the Court must resolve the threshold issue of whether a seizure has in fact occurred: if no seizure has occurred, then no probable cause or even reasonable suspicion is required. *See Florida v. Royer*, 460 U.S. 491, 497-98 (1983) ("If there is no . . . no seizure within the meaning of the Fourth Amendment[,] then no constitutional rights have been infringed."); *Madison*, 936 F.2d at 92-93 ("It is well[]established that a police officer is free to approach a person in public and ask a few questions; such conduct, without more, does not constitute a seizure;" rather, to be a seizure, "the individual's actual freedom must be curtailed.").

Rather, the Court finds that the encounter in question is more appropriately viewed as one of the "three types of encounters that may occur between law enforcement and individuals." *United States v. Hooper*, 935 F.2d 484, 490 (2d Cir. 1991). "The first type is a consensual encounter whereby an individual willingly agrees to speak to law enforcement personnel." *United States v. Glover*, 957 F.2d 1004, 1008 (2d Cir. 1992). "Such contact may be initiated by the police without any objective level of suspicion and does not, without more, amount to a 'seizure' implicating the Fourth Amendment's protections." *Glover* 957 F.2d at 1008; *see also United States v. Adegbite*, 846 F.2d 834, 837 (2d Cir. 1988) ("[N]ot only is the probable cause required for effecting an arrest not mandated, but even the reasonable suspicion required for a brief detention or *Terry* stop is not necessary"). "[E]ven when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual, ask to examine the individual's identification, and request consent to search his or her luggage, as long as the police do not convey a message that compliance with their requests is required." *Florida v. Bostick*, 501 U.S. 429, 434-35 (1991); *accord, United States v. Drayton*, 536 U.S. 194, 201 (2002).

"The second type of encounter, based on the principles enunciated in *Terry v. Ohio*, 392 U.S. 1 (1968), involves a limited investigative stop of an individual and/or his or her bags." *Id.* (*see United States v. Sharpe*, 470 U.S. 675, 682 [1985]; *United States v. Place*, 462 U.S. 696, 702 [1983]; *see also Hooper*, 935 F.2d at 490, 492-93). "Although limited in scope, such investigative detentions are 'seizures' under the Fourth Amendment, and must be based on 'a reasonable suspicion supported by articulable facts that criminal activity may be afoot.'" *Id.* (citing *United States v. Sokolow*, 490 U.S. 1, 7 [1989]).

"The third type of encounter is an arrest–plainly a Fourth Amendment 'seizure'–that must be based on probable cause." *Id.* (citing *Hooper*, 935 F.2d at 490; *United States v. Bradley*, 923 F.2d 362, 364 [5th Cir. 1991]).

"To determine whether a 'seizure' has occurred triggering the Fourth Amendment's protections, a court must consider 'if, in view of all the circumstances surrounding the [encounter], a reasonable person would have believed that he was not free to leave.'" *Id.* (quoting *United States v. Lee*, 916 F.2d 814, 819 [2d Cir. 1990]; *Michigan v. Chesternut*, 486 U.S. 567, 573 [1988]; *United States v. Mendenhall*, 446 U.S. 544, 554 [1980]; *see also Bostick*, 501 U.S. at 439). "The test is an objective one, based on how a reasonable innocent person would view the encounter." *Id.* (citing *Bostick*, 501 U.S. at 437-38) (citation omitted). Courts have considered the following six factors that may suggest that a seizure has occurred: (1) the threatening presence of several officers; (2) the display of a weapon; (3) the physical touching of the person by the officer; (4) language or tone indicating that compliance with the officer was compulsory; (5) prolonged retention of a person's personal effects, such as airplane tickets or identification; and (6) a request by the officer to accompany him to the police station or police

room. *Lee*, 916 F.2d at 819 (citing *Mendenhall*, 446 U.S. at 554; *United States v. Moreno*, 897 F.2d 26, 30 [2d Cir. 1990]; *United States v. Tavolacci*, 895 F.2d 1423, 1425-26 [D.C. Cir. 1990]; *United States v. Ceballos*, 812 F.2d 42, 47-48 [2d Cir. 1987]; *see also Florida v. Royer*, 460 U.S. 491, 501 [1983]).

Here, although the agents were wearing "full Border Patrol rough duty uniform" at the time of the encounter, there were only two such agents, and there is no evidence that the agents brandished their weapons, physically touched Defendant or anyone else standing in line, or spoke in a manner that make a reasonable person to feel compelled to respond. *See Drayton*, 536 U.S. at 204-05 (indicating that whether officers are in uniform or visibly armed are factors that "should have little weight in the analysis" of whether a seizure has occurred because an officer's wearing of a uniform or a sidearm is often a cause for reassurance rather than discomfort, the fact that law enforcement officers are armed is a fact well known to the public, and "the presence of a holstered firearm thus is unlikely to contribute to the coerciveness of the encounter absent active brandishing of the weapon"); *United States v. Hernandez*, 90-CR-0135, 1990 WL 141956, at *2 (N.D.N.Y. Sept. 27, 1990) (Munson, J.) (holding that an interaction was a consensual encounter where the officer was "in full Border Patrol uniform and carrying a weapon" but the officer did not brandish the weapon, physically touch or threaten the defendant, or speak in a manner in which a reasonable person would feel compelled to remain and respond"); *United States v. Delgado*, 797 F. Supp. 213, 217 (W.D.N.Y. 1991) (holding that an interaction was consensual where the officer "was visibly armed" but there was "no evidence that he displayed it in a threatening manner").

Moreover, the fact that the questioning went on for "a few minutes" (Dkt. No. 9, Attach. 2, at ¶ 14) does not warrant a finding that a seizure occurred. According to Black's law dictionary, the word "few" means "not many; of a small number." *Black's Law Dictionary*, 561 (5th ed. 1979). Courts have held that interactions that last only minutes do not convert a consensual encounter to a seizure within the meaning of the Fourth Amendment. *United States v. DeLouya*, 04-CR-0588, 2005 WL 3244173, at *17 (N.D.N.Y. Nov. 30, 2005) (Sharpe, J.) (holding an interaction that lasted "only minutes" was a consensual police-citizen encounter"); *United States v. Deas*, 17-CR-0719, 2018 WL 3023282, at *5 (S.D.N.Y. June 15, 2018) (holding an encounter that lasted "only 30 minutes" was consensual); *United States v. Archeval-Vega*, 883 F. Supp. 904, 908 (W.D.N.Y. 1994) (finding a consensual encounter where an officer conducted an immigration check that took approximately two or three minutes).

Furthermore, it is of little, if any, consequence that Defendant may have feared missing the bus if he left the line.[5] Such a fact would not mean that the agents seized him. This would be the case even if the agents had placed themselves in the doorway to the bus,[6] or had approached Defendant after he had already boarded the bus.[7] Because Defendant could have stepped out of

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[5] The Court notes that Defendant's affidavit is conspicuously absent of a statement that he feared missing the bus if he stepped out of line. (Dkt. No. 9, Attach. 2.)

[6] *See United States v. Montano*, 505 F. App'x 299 (5th Cir. 2013) (finding no seizure within the meaning of the Fourth Amendment where officers positioned "themselves at the entrance to a bus, identify[ed] themselves to boarding passengers as border patrol agents, ask[ed] the passengers to show proof of citizenship, and request[ed] permission to search carry-on bags").

[7] *See Drayton*, 536 U.S. at 201 ("A passenger may not want to get off a bus if there is a risk it will depart before the opportunity to reboard . . . [a] bus rider's movements are confined in this sense, but this is the natural result of choosing to take the bus; it says nothing about whether the police conduct is coercive."); *Bostick*, 501 U.S. at 436 ("[T]he mere fact that Bostick did not feel free to leave the bus does not mean that the police seized him. Bostick was a passenger on a bus that was scheduled to depart. He would not have felt free to leave the bus

line, he was not seized within the meaning of the Fourth Amendment. *See Florida v. Rodriguez*, 469 U.S. 1, 4-6 (1984) (holding that an initial contact between police officers and a suspect, when the officer simply asked the suspect if he would step aside and talk with them in an airport concourse, was the sort of consensual encounter that implicated no Fourth Amendment interest).

It is also of little, if any, consequence whether the agents approached him from either end of the line or together. *Cf. INS v. Delgado*, 466 U.S. 210, 216-18 (1984) (concluding that, even though factory workers were not free to leave their workplace without being questioned, the agents' conduct should have given employees "no reason to believe that they would be detained if they . . . refused to answer"). This is the case even if the agents approached and questioned him together. *See Glover*, 957 F.2d at 1006, 1009 (holding that an encounter was consensual where two officers approached and questioned the defendant).

It is also of little, if any, consequence that Defendant "only know[s] limited English" where, as here, there is no evidence that the defendant could not understand the questions during their encounter. *See United States v. Archeval-Vega*, 883 F. Supp. 904, 908 (W.D.N.Y. 1994) (holding that an encounter was consensual where the defendant responded in "broken English" but the agent "did not have the impression that [the defendant] could not understand him"). The Court notes that Defendant's wife occasionally translated for him after the initial part of the

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even if the police had not been present. Bostick's movements were 'confined' in a sense, but this was the natural result of his decision to take the bus; it says nothing about whether or not the police conduct at issue was coercive"); *United States v. Thompson*, 941 F.2d 66, (2d Cir. 1991) (holding an interaction was a consensual encounter where interaction occurred on train, the officers did not physically impede the defendant's access to the aisle, and the train remained at the station for the duration of the interaction); *Madison*, 936 F.2d at 92-94 (finding that defendant, when questioned while aboard a commuter bus that was about to depart from its point of origin, was not seized within the meaning of the Fourth Amendment).

encounter (Dkt. No. 10, Attach. 1, at ¶ 8 [Audet Aff.]; Dkt. No. 10, Attach. 2, at ¶ 9 [Bell Aff.]), and that no record evidence exists that Defendant's wife mistranslated any statement (Dkt. No. 11, at 3 [Def.'s Reply Mem. of Law]).

It is also of little, if any, consequence that Defendant states that "I was never informed that I did not have to answer their questions." (Dkt. No. 9, Attach. 2, at ¶ 13.) "While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response." *Delgado*, 466 U.S. at 216.

Finally, it is of little, if any, consequence that the question regarded "a trait that could be incriminating" (citizenship). *Bostick*, 501 U.S. at 437-38 (citing *Royer*, 460 U.S. at 519, n.4) (rejecting the defendant's argument that "he must have been seized because no reasonable person would freely consent to a search of luggage that he or she knows contains drugs . . . because the 'reasonable person' test presupposes an *innocent* person").

For all of these reasons, Defendant's request to suppress the specified evidence is denied.

ACCORDINGLY, it is

ORDERED that Defendant's motion to suppress (Dkt. No. 9) is **DENIED**.

Dated: June 27, 2019
Syracuse, New York

Hon. Glenn T. Suddaby
Chief U.S. District Judge